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In the Supreme Court of the United States

OCTOBER TERM, 1993

JANET M. CLARK, PETITIONER

v.

DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
BRYANT G. SNEE
JERI KAYLENE SOMERS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the determination of an administrative judge of the Merit Systems Protection Board that petitioner's "whistle-blowing" disclosures were not a contributing factor in the personnel actions taken against her by her employer.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Braga v. *Department of the Army*, 54 M.S.P.B. 392 (1992)	9
Caddell v. *Department of Justice*, 52 M.S.P.B. 529 (1992)	10
Marano v. *Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993)	11
McDaid v. *Department of Housing & Urban Dev.*, 46 M.S.P.B. 416 (1990)	7, 10

Statutes:

Whistleblower Protection Act, 5 U.S.C. 1221 *et seq.* (Supp. IV 1992)	11
5 U.S.C. 1221	5
5 U.S.C. 1221(e)(1)	7
5 U.S.C. 1221(e)(2)	7
5 U.S.C. 2302(b)(8)	5, 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 997 F.2d 1466. The initial decision of the Merit Systems Protection Board (Pet. App. A17-A36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1993. The petition for a writ of certiorari was filed on September 29, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner worked for the United States Department of the Army for approximately 26 years. Pet. App. A2, A31. In 1986, while petitioner was a Production Controller, GS-8, at the Savannah Army Depot Activity (SADA), she made a series of complaints to the Army's Office of the Inspector General (OIG) about misuse of government telephones, drinking on the job, and mismanagement of time and materials. *Id.* at A2, A28. Approximately three years later, in mid-1989, petitioner was reassigned to the position of Computer Assistant, GS-8. In July, 1989, Lt. Col. John Phillis, Jr., assumed command at SADA, and in August, 1989, Captain Michael Demcko became Chief of SADA's Mission Division, and one of petitioner's supervisors. *Ibid.* Although neither Lt. Col. Phillis nor Capt. Demcko was a subject of petitioner's previous OIG complaints, they may have been aware of them. *Ibid.*

In May, 1990, SADA was directed to reduce staffing levels. Pet. App. A2, A32. On June 21, 1990, Capt. Demcko identified nine positions, including petitioner's, that would be subject to a reduction-in-force (RIF). *Id.* at A2, A32-A33. Petitioner was informed on August 6, 1990, that her position was being eliminated. *Id.* at A2, A32. She was offered, and she accepted, the position of Supply Clerk and Technician, GS-5, in the Installation Supply Branch of SADA's Mission Division.[1] *Id.* at A2. In September and

[1] Subsequent to the RIF, petitioner filed a complaint with the Office of Special Counsel (OSC), alleging that the RIF abolishing her position was a reprisal for her whistleblowing. Pet. App. A3. By letter dated February 6, 1991, the OSC

October of 1990, after commencing her new duties, petitioner made several complaints to her supervisors and to OIG, including complaints that supplies had been improperly ordered through a local source rather than the central federal supply system, that requisition forms and vendor payments had been improperly processed, that personnel had been inadequately trained, and that an employee had been selling commercial products during work. *Id.* at A2-A3, A28-A29.

On December 6, 1990, the Chief of the Installation Support Division appointed petitioner as the Alternate Imprest Fund Cashier. Pet. App. A3, A18. That position required petitioner to maintain $3,000 in an account to provide imprest fund services in the absence of the primary cashier, and to maintain in the same account adequate additional funds to cover disbursements. *Id.* at A3, A18-A19. On March 1, 1991, the primary cashier told petitioner to sign an interim cash receipt for money for the Imprest Fund. *Ibid.* Petitioner refused. *Id.* at A3, A19. The primary cashier reported petitioner's refusal to petitioner's supervisor, who then instructed petitioner to sign for the funds. *Id.* at A3, A19-21. A heated discussion ensued, and petitioner again refused to sign. *Ibid.*

On March 4, 1991, petitioner's supervisor instructed her in writing to sign for the funds. Pet. App. A3-A4, A21-22. Petitioner acknowledged receipt of the written order, but again refused to comply. *Id.* at A4, A22. The written order placed petitioner on notice that her refusal to sign for the funds would "be

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informed petitioner that it had found no evidence to support her allegation, and that the timing of events made it unlikely that the RIF was a reprisal. *Id.* at A3, A34.

considered insubordination and may be grounds for disciplinary action up to and including removal." *Id.* at A3, A24. Based upon petitioner's refusal to sign for the funds, the supervisor requested that her supervisor, Capt. Demcko, direct petitioner to sign for the money. *Id.* at A4, A22-A23. Capt. Demcko did so, and petitioner complied with Capt. Demcko's order. *Ibid.*[2]

In January, 1991, petitioner received oral and written instructions concerning the need to expedite high priority Desert Storm requisitions by ordering supplies locally if requested. Pet. App. A4, A25-A26. Despite these instructions, petitioner decided to order high priority supplies through the slower federal supply system. *Ibid.* On April 8 and 10, and May 8, 1991, petitioner altered the supply source on four high priority Desert Storm requisition forms without authorization. *Ibid.*

On June 17, 1991, Capt. Demcko proposed petitioner's removal from federal service because of her defiance of authority, her failure to follow instructions and her delay in carrying out instructions. Pet. App. A4. Petitioner complained to the OSC that her proposed removal was in reprisal for whistleblowing. *Ibid.* She requested that the OSC seek a stay of the proposed action from the MSPB, but the OSC declined

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[2] On April 5, 1991, petitioner filed a complaint with the OSC, alleging that she was "threatened" with disciplinary action because of disclosures she had made to OIG. Pet. App. A4. The OSC conducted an investigation, and by letter dated June 5, 1991, informed petitioner that the information she had supplied indicated no connection between the threat and her disclosures; rather, it appeared that her supervisors had threatened her with a disciplinary action in March, 1991, because she had refused to perform her duties. *Ibid.*

to pursue the matter. *Ibid.* After an oral and written reply, Lt. Col. Phillis removed petitioner on July 30, 1991. *Ibid.*

2. Petitioner appealed both her removal for cause and the earlier RIF action to the Merit Systems Protection Board (the Board). See 5 U.S.C. 1221 (Supp. IV 1992). Her appeals were consolidated. On January 17, 1992, the Administrative Judge (AJ) affirmed both actions in an Initial Decision. Pet. App. A17-A36.

The AJ found that petitioner had disobeyed orders and instructions. Pet. App. A18-A28. The AJ found petitioner's explanations for that behavior inconsistent and incredible, and concluded that her removal was warranted to promote the efficiency of the service. *Id.* at A20, A23, A26-A28.

With respect to petitioner's allegations that the RIF and her removal were taken in reprisal for her whistleblowing disclosures, the AJ expressed doubt that petitioner's complaints rose to the level of protected "whistleblowing" under 5 U.S.C. 2302(b)(8) (Supp. IV 1992). Pet. App. A29-A30. He found it unnecessary to address that issue, however, because he concluded that petitioner had not established that her disclosures were a "contributing factor" to the personnel actions. *Ibid.* The AJ explained that most of petitioner's complaints were "directed against her co-workers," that none resulted "in the imposition of disciplinary action against any agency employee," and that none alleged intentional wrongdoing or abuse of authority by her superiors:

> The fact that [petitioner's] disclosures were not personally directed against [her two superiors] renders it less likely that they instituted this

> removal action due to the disclosures. Moreover, record evidence does not show that either individual expressed irritation or a desire to retaliate against [petitioner] based on the filing of the complaints. Finally, the propriety of the removal action itself is amply supported in this record. Management was simply confronted by an employee who refused to perform her duties and who has a documented history of defying supervisory authority. * * * I therefore find that [petitioner] * * * has not established by preponderant evidence that whistleblowing disclosures contributed toward the agency's decision to remove her.

Id. at A30.[3] In light of petitioner's previous record of disciplinary action for insubordination, the AJ also concluded that petitioner's supervisors reasonably concluded that she had no rehabilitation potential. *Id.* at A31. The AJ's initial decision became final on February 21, 1992, when neither party filed a petition for review with the full Board. *Id.* at A5.

3. The court of appeals affirmed. Pet. App. A1-A16. The court first rejected petitioner's claim that the AJ erred by finding it unnecessary to determine whether her disclosures amounted to protected "whistleblowing." The court agreed with petitioner that a complete analysis of an employee's whistleblower defense to an agency's adverse personnel action consists of three steps: First, the AJ must determine

[3] The AJ also rejected petitioner's claim that the RIF action was motivated by whistleblowing, noting that her position had been identified for abolition before her 1990 complaints. Pet. App. A34.

whether the employee's disclosure was protected "whistleblowing" activity under 5 U.S.C. 2302(b)(8) (Supp. IV 1992). Second, the AJ must determine whether the disclosure was a "contributing factor" in the agency's personnel action. See 5 U.S.C. 1221(e)(1) (Supp. IV 1992). And third, if the protected disclosure was a "contributing factor" to the adverse personnel action, the AJ may uphold that action only if the agency proves by "clear and convincing" evidence that it would have taken the same action in the absence of the disclosure. See 5 U.S.C. 1221(e)(2) (Supp. IV 1992). The court of appeals, however, found nothing in either 5 U.S.C. 2302(b)(8) (Supp. IV 1992) or its legislative history mandating any particular sequence of analysis for the statutory issues, and it saw no reason why an administrative judge may not organize his or her work in each case so as to decide only the issues on which the controversy actually turns. Pet. App. A9.

The court next rejected petitioner's contention that the AJ erred in failing to undertake a "knowledge/timing" analysis in order to determine whether petitioner's disclosures were a "contributing factor" in the personnel decision. Under such an analysis, the AJ would be required to determine that the disclosures were a "contributing factor" if petitioner's supervisors had actual or constructive knowledge of her complaints and disclosures when they acted, such that a reasonable person could conclude from the timing alone that the disclosures were a factor in the personnel action. Pet. App. A10. The court agreed with petitioner that in *McDaid* v. *Department of Housing & Urban Dev.*, 46 M.S.P.B. 416, 421 (1990), the Board had interpreted Section 1221(e)(1) to mean

that an employee can prove that whistleblowing was a "contributing factor" merely by showing such knowledge, but the court noted that in doing so the Board had relied on the legislative history of a predecessor bill that would have expressly incorporated that rule into the statute. Because the bill that actually passed omitted that language, the court refused to adopt the *McDaid* interpretation. Pet. App. A10-A13.

Finally, the court of appeals rejected petitioner's claim that the AJ erred in considering the fact that the Army had good grounds for removing her for insubordination, as part of the issue of whether petitioner's whistleblowing was a step-two "contributing factor." The court acknowledged that the third step of the required analysis—whether the agency would have taken the same action absent the whistleblowing—must be proven by the agency by "clear and convincing" evidence. But the court rejected petitioner's claim that the AJ is therefore required to apply that heightened standard of proof whenever the AJ considers the reasons for the agency's action, even when (as here) the AJ finds that evidence logically relevant to the second step of the analysis—whether the employee's whistleblowing was a "contributing factor" in the dismissal.

ARGUMENT

1. Petitioner's principal contention (Pet. 10-23) is that the court of appeals erred in failing to defer to prior decisions of the Merit Systems Protection Board that support each of the three legal arguments she advanced below. Petitioner argues (Pet. 14) that the Board interpretations were entitled to deference under principles of administrative law, because the

Board is the agency charged by Congress with administering the statute.

Petitioner's first legal argument in the court of appeals was that the AJ erred by not making a finding on the question under step one of the statutorily required three-step analysis—whether petitioner's activities constituted protected "whistleblowing" activity—before proceeding to the other two steps of that analysis. The Board's decision in *Braga* v. *Department of the Army*, 54 M.S.P.B. 392, 397 (1992), appears to require that such a finding be made in all cases. The court of appeals rejected that interpretation, however, because "[w]hen we examine the statute, we find that it does not mandate any particular sequence of analysis" (Pet. App. A9). The court also found that petitioner had not "pointed to any legislative history that would require" a particular sequence in which the statutory issues should be decided. The court concluded that "[t]here is no reason why an administrative judge may not assume for purposes of analysis that a petitioner has established the first step, and address the second step first," since, if petitioner fails at the second step, "it is unnecessary, and probably wasteful, to require [the AJ] also to address step one." *Ibid.*

Petitioner next argued in the court of appeals that the AJ failed to use a "knowledge/timing" test in connection with step two of the required analysis. Such a test would permit an employee conclusively to show that whistleblowing was a "contributing factor" in a personnel action by showing "that the official taking the action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude

that the disclosure was a factor in the personnel action." Pet. App. A10. The Board had interpreted the statute to incorporate such a *per se* "contributing factor" test in *McDaid* v. *Department of Housing & Urban Dev.*, 46 M.S.P.B. 416, 421 (1990). The court of appeals, although recognizing that "[t]here may be cases in which the timing is a factor supporting a conclusion that whistleblowing was a contributing factor" (Pet. App. A13), rejected the *McDaid* interpretation: "The statute contains no 'per se' rule that knowledge of the disclosure and timing of the personnel action automatically satisfies this burden of proof. In fact, such a 'per se' rule was proposed but was deleted [by Congress] before enactment. There can be no clearer manifestation of Congressional intent to avoid a mandatory knowledge/timing test." Pet. App. A12.

Finally, petitioner argued in the court of appeals that the AJ erred in not evaluating the agency's evidence offered to show a legitimate basis for the personnel decision under the "clear and convincing" standard required by step three of the statutory analysis. The AJ had, instead, evaluated this evidence as part of its decision on step two, thus using a more easily satisfied preponderance standard. Pet. App. A13-A14. The court of appeals acknowledged that petitioner's argument here was supported by the Board's interpretation in *Caddell* v. *Department of Justice*, 52 M.S.P.B. 529, 533 (1992). The court rejected that interpretation, however, because it "confuses the weight given to a particular piece of evidence with the burden of proof a party bears on a particular issue." Pet. App. A14.

2. Petitioner also contends (Pet. 25-26) that the court of appeals' decision in this case conflicts with the decision of a different panel of the Federal Circuit in *Marano* v. *Department of Justice*, 2 F.3d 1137 (1993). Petitioner points out that the *Marano* panel relied in part on legislative history that the panel in the present case explicitly rejected. Pet. App. A12. The *Marano* panel also disagreed with the panel in this case on two of the three legal issues raised by petitioner—the applicability of a *per se* timing/knowledge rule in step two and the necessity of using step three's "clear and convincing" evidentiary standard in evaluating an agency's proffered legitimate reasons for a personnel action.

3. The decision of the panel of court of appeals in this case thus explicitly rejects the Merit Systems Protection Board's interpretations of three related procedural and evidentiary provisions of the Whistleblower Protection Act, 5 U.S.C. 1221 *et seq.* (Supp. IV 1992). In doing so, the panel's decision is apparently also in substantial conflict with that of a different panel of the Federal Circuit in *Marano*. The issues thus raised, however, are not appropriate for this Court's resolution at this time. Petitioner in this case did not avail herself of the opportunity to petition the full Board for review of the AJ's initial decision. Such a petition would have given the Board the opportunity to address the conflict between that initial decision and contemporaneous Board interpretations. Nor did petitioner seek rehearing *en banc* in the Federal Circuit so as to afford that court the occasion to resolve the apparent conflict between the panel in this case and the *Marano* panel.

As petitioner suggests (Pet. 23), inconsistent decisions by the Federal Circuit on matters within its exclusive jurisdiction (as to which no inter-circuit conflict can develop) may in some circumstances warrant review by this Court. There is no reason to believe, however, that the Federal Circuit will not reconcile any conflict when given the opportunity. Review by this Court of any important differences in approach between the Board and the Federal Circuit regarding the proper interpretation of the procedural provisions of the Whistleblower Protection Act would also be more appropriate after, rather than before, any such intracircuit conflict is resolved. Finally, as both the AJ and the court of appeals opinions clearly demonstrate, there is unquestionably ample basis in this case for concluding that petitioner's discharge was, in fact, caused by her insubordination rather than any protected whistleblowing activity on her part.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DAVID M. COHEN
BRYANT G. SNEE
JERI KAYLENE SOMERS
Attorneys

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